



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 849

RIN 3206-AO08

Representative Payees Under the Civil Service Retirement System and Federal Employees' Retirement System

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing this final rule to promulgate regulations which administer the representative payee program authorized by statute. This final rule is necessary to ensure proper procedures for annuity payments due minors or individuals who are mentally incompetent or under other legal disability and are unable to manage their respective payments.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Michael Shipley, (202) 606-0299. Email: Comboxinternet@opm.gov. Include the RIN in the subject line of the email.

SUPPLEMENTARY INFORMATION: On March 8, 2021, OPM issued a proposed rule at 86 FR 13217 for the purpose of promulgating regulations to administer the representative payee program under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS). Under CSRS, the provisions of Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 582 authorized the United States Civil Service Commission, precursor to the United States Office of Personnel Management (OPM), to make payments due a minor or an individual mentally incompetent, or under other legal disability, to a person who is constituted guardian or other fiduciary by the law of the State of residence of the claimant or any person, who in the judgment of the Commission, is responsible for the care of the claimant. Similarly, the FERS Act

of 1986, Pub. L. 99-335, Title I, section 101(a), June 6, 1986, 100 Stat. 575, authorized OPM to make the same payments under FERS. According to these statutes, OPM has historically authorized these payments to individuals, and in some instances, organizations on behalf of the annuitant as representative payees.

On March 18, 2020, Congress enacted Pub. L. 116-126, 134 Stat. 174-177 (2020), the Representative Payee Fraud Prevention Act of 2019 (the Act), which made numerous changes to existing statutes regarding representative payees. First the Act officially defined the term representative payee under both CSRS and FERS as the “person (including an organization) designated...to receive payment on behalf of a minor or an individual mentally incompetent or under other legal disability” at 5 U.S.C. 8331(33) and 5 U.S.C. 8401(39), respectively. Ensuring that organization was added to the definition recognizes that other entities, such as agencies, institutions, nursing homes, et al., may serve as representative payees.

Congress also enacted 5 U.S.C. 8345a and 8466a to address the embezzlement or conversion of payments. Congress made it unlawful for a representative payee to use the funds received as a representative payee for any use other than the use and benefit of the individual on whose behalf the payments were received. OPM was given the authority to revoke certification as a representative payee, if we determine that a representative payee has embezzled or converted the annuity payments, and to certify payments to another representative payee or directly to the annuitant. Congress set forth the penalty for misuse of benefits by a representative payee, under title 18 U.S.C., as a fine, imprisonment for not more than 5 years, or both.

Furthermore, in selecting a representative payee, OPM was granted authority to defer or suspend the annuity payment until a representative payee is located, if we determine that paying the annuitant directly would cause substantial harm to the annuitant. Substantial harm exists if both of the following conditions exist:

- (1) Direct payment of benefits can be expected to cause serious physical or mental injury to the individual; and

(2) The potential effect of the injury outweighs the effect of having no income to meet the basic needs of the individual.

We have included this language concerning substantial harm to the proposed regulations.

Finally, the Act created limitations on who can be appointed as a representative payee. Individuals that have been convicted of a violation of: (1) 5 U.S.C. 8345a or 8466a; (2) section 208 or 1632 of the Social Security Act (42 U.S.C. 408, 1383a); or (3) section 6101 of title 38, are barred from serving as a representative payee.

OPM is promulgating these regulations to fully implement and administer the representative payee program for CSRS and FERS. The regulations are required to prevent misuse and fraud by representative payees.

The public comment period on the proposed rule ended May 7, 2021. OPM received four substantive comments. Three of the comments voiced general support for the proposed rule in protecting vulnerable individuals from potential misuse by the representative payee. OPM received one comment from the American Association of Nurse Practitioners (AANP). The AANP suggested amending the language in 5 CFR 849.203 from “medical professional” to “licensed health practitioner.” In addition, the AANP suggested amending 5 CFR 849.602 to include the language “or other licensed health practitioner’s” when identifying statements that are acceptable to stop representative payments. The AANP reasoned that the term licensed health practitioner is already defined under 5 CFR 339.104, and that these changes more closely align with other regulations at 5 CFR 831.1202 and 844.102 that OPM uses to administer annuity benefits under CSRS and FERS. OPM agrees and has adopted the AANP’s recommendations by amending 5 CFR 849.203 and 849.602, to include “licensed health practitioner” as appropriate. OPM has also amended 5 CFR 849.102 to include the definition for physicians and practitioners.

Regulatory Impact Analysis

OPM has examined the impact of this proposed rule as required by Executive Order 12866 and Executive Order 13563, which directs agencies to assess all costs and benefits of

available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of \$100 million or more in any one year. This rule is not a “significant regulatory action,” under Executive Order 12866 and was not reviewed by the Office of Management and Budget (OMB).

Regulatory Flexibility Act

The Office of Personnel Management certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 et seq.) requires rules (as defined in 5 U.S.C. 804) to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this action before its effective date, as required by 5 U.S.C. 801. This is not a “major rule” as defined by the Congressional Review Act (5 U.S.C. 804(2)).

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid OMB Control Number. Two currently approved collections are associated with this rulemaking.

- 3206-0140 Representative Payee Application/Information Necessary for a Competency Determination which is comprised of 2 forms – an application form and a separate form for a competency determination. OPM is requesting, for OMB has approval, a change to the competency determination form to add “other licensed health practitioner” when identifying the medical information required for the competency determination. An Emergency request will be published shortly after this rule.
- 3206-0208 – Representative Payee Survey This information collection will not be impacted due to the changes in this rule.

The systems of record notice for both collections is: <https://www.opm.gov/information-management/privacy-policy/sorn/opm-sorn-central-1-civil-service-retirement-and-insurance-records.pdf>.

List of Subjects in 5 CFR Part 849

Claims, Disability benefits, Fraud, Pensions, Retirement.

Office of Personnel Management.

Alexys Stanley,
Regulatory Affairs Analyst.

For the reasons stated in the preamble, the Office of Personnel Management adds 5 CFR part 849 to read as follows:

PART 849—REPRESENTATIVE PAYEES

Subpart A—General Provisions

Sec.

849.101 Applicability and purpose.

849.102 Definitions.

849.103 Implementing directives.

Subpart B—Determining Whether or Not Representative Payment is Appropriate

849.201 When to make payment to a representative payee.

849.202 Payment of annuity while finding a suitable representative payee.

849.203 Information considered in determining whether to appoint a representative payee.

Subpart C—Selection of a Representative Payee

849.301 Information considered in selecting a representative payee.

849.302 Order of preference in selecting a representative payee.

849.303 Individuals who may not serve as a representative payee.

849.304 Selecting a representative payee.

849.305 Notice of determination to select a representative payee.

Subpart D—Responsibility and Accountability of a Representative Payee

849.401 Responsibilities of a representative payee.

849.402 Use of payments.

849.403 Accountability of a representative payee.

Subpart E—Misuse of Annuity by a Representative Payee

849.501 Misuse of benefits by a representative payee.

849.502 Liability for misused funds.

Subpart F – Changes to the Representative Payee

849.601 When a new representative payee will be selected.

849.602 When representative payments will be stopped.

849.603 Transfer of conserved or accumulated funds.

Authority: 5 U.S.C. 8331; 5 U.S.C. 8345(e)-(f); 5 U.S.C. 8345a; 5 U.S.C. 8401; 5 U.S.C. 8461; 5 U.S.C. 8466(c)-(d); 5 U.S.C. 8466a.

Subpart A—General Provisions

§ 849.101 Applicability and purpose.

This part contains regulations of the Office of Personnel Management (OPM) to implement the provisions 5 U.S.C. 8345(e) – (f), 8345a, 8466(c) – (d), and 8466a regarding payment of an annuity to a representative payee. This part establishes the criteria OPM uses to determine if representative payments are appropriate, the information OPM uses to select a representative payee, the responsibilities of a representative payee, the accountability of a representative payee, the limitations on the appointment of a representative payee, and the definition of and penalty for misuse of benefits by the representative payee.

§ 849.102 Definitions.

As used in this part:

Agency means the Office of Personnel Management (OPM).

CSRS means the Civil Service Retirement System as described in subchapter III of chapter 83 of title 5, United States Code.

FERS means the Federal Employees' Retirement System as described in chapter 84 of title 5, United States Code.

Misuse of benefits means the embezzlement or conversion of all or any part of the amount received by the representative payee for a use other than for the use and benefit of the minor or individual on whose behalf such payments were received.

Physician and *practitioner* have the same meaning given these terms in § 339.104 of this chapter.

Representative payee means a person, who is at least 18 years of age, or an organization designated to receive annuity payments on behalf of a minor or an individual mentally incompetent or under other legal disability.

§ 849.103 Implementing directives.

The Director may prescribe, in the form he or she deems appropriate, such detailed procedures as are necessary to carry out the purpose of this part.

Subpart B—Determining Whether or Not Representative Payment is Appropriate

§ 849.201 When to make payment to a representative payee.

The agency will make payment to a representative payee —

- (a) If payments are due to a minor under the age of 18; or
- (b) If payments are due to an annuitant or survivor who is mentally incompetent or under other legal disability; or
- (c) If payments are due to an annuitant when the annuitant is physically or mentally incapable of managing or directing the management of his or her benefit.

§ 849.202 Payment of annuity while finding a suitable representative payee.

(a) Annuity payments will be made directly to the annuitant or survivor annuitant while a suitable representative payee is located, unless the agency determines that direct payment would cause substantial harm to the individual.

(b) Substantial harm exists if both of the following conditions exist:

- (1) Direct payment of benefits can be expected to cause serious physical or mental injury to the individual; and
- (2) The potential effect of the injury outweighs the effect of having no income to meet the basic needs of the individual.

(c) If the agency determines that direct payment of benefits would cause substantial harm to the annuitant, annuity payments may be deferred (in the case of initial entitlement to benefits) or suspended (in the case of existing entitlement to benefits) until such time as a representative payee is appointed.

(d) Annuity payments will commence or resume as soon as practicable and will include all retroactive payments due to be paid.

§ 849.203 Information considered in determining whether to appoint a representative payee.

In determining whether to appoint a representative payee, the agency will consider the following information:

(a) *Evidence of legal guardianship or other court determinations.* Evidence of the appointment of a legal guardian or other person legally vested with the care of the individual or estate of an incompetent or a minor shall be a certified copy of the court's determination.

(b) *Medical evidence.* The agency will use medical evidence to help determine whether an annuitant is capable of managing or directing the management of benefit payments. For example, a statement by a physician or other licensed health practitioner, based upon his or her recent examination of the annuitant and his or her knowledge of the annuitant's present condition, will be used in the agency's determination, if it includes information concerning the nature of the annuitant's illness or disability, the annuitant's chances for recovery, and the opinion of the physician or other licensed health practitioner as to whether the annuitant is able to manage or direct the management of benefit payments.

(c) *Other evidence.* The agency may also require statements of relatives, friends, or other people in a position to know and observe the annuitant, which contain information helpful to the agency in deciding whether the annuitant is able to manage or direct the management of benefit payments.

Subpart C—Selection of a Representative Payee

§ 849.301 Information considered in selecting a representative payee.

The goal in selecting a payee is to select the person, organization, or institution that will best serve the interest of the annuitant. In making the selection, the agency considers—

- (a) The age of the representative payee applicant. An individual must be over the age of 18 to serve as a representative payee, except as listed in § 849.303(a);
- (b) The relationship of the person, organization, or institution to the annuitant;
- (c) Legal authority, in the form of conservatorship or guardianship, that the person, organization, or institution has to act on behalf of the annuitant;
- (d) The amount of concern that the person or organization shows in the annuitant;
- (e) Whether the potential payee has custody of the annuitant;
- (f) Whether the potential payee is in a position to know of and look after the needs of the annuitant;
- (g) Whether the representative payee applicant is currently serving, or has previously served, as a representative payee for other annuitants; and
- (h) The potential representative payee's criminal history.

§ 849.302 Order of preference in selecting a representative payee.

As a guide in selecting a representative payee, categories of preferred payees are set out in paragraphs (a) through (e) of this section. The primary concern of the agency is to select the payee who will best serve the annuitant's interest. The preferences, in descending order of importance, are:

- (a) A legal conservator, guardian, spouse, or other relative who has custody or guardianship of the annuitant or who demonstrates strong concern for the personal welfare of the annuitant;
- (b) A friend or neighbor who has custody or guardianship of the annuitant or demonstrates strong concern for the personal welfare of the annuitant;

(c) A public or nonprofit agency or institution having custody or guardianship of the annuitant;

(d) A private institution operated for profit and licensed under State law, which has custody or guardianship of the annuitant; and

(e) Persons other than those listed in paragraphs (a) through (d) of this section who are qualified to carry out the responsibilities of a representative payee and who are able and willing to serve as a payee for an annuitant; e.g., members of community groups or organizations who volunteer to serve as representative payee for an annuitant.

§ 849.303 Individuals who may not serve as a representative payee.

A representative payee applicant may not serve as a representative payee if he or she:

(a) Is under the age of 18, unless he or she is the custodial parent of the minor child applying for or receiving the annuity;

(b) Is found by a court to be incompetent or receives benefits under title II or title XVI of the Social Security Act through a representative payee or receives a retirement annuity pursuant to CSRS or FERS through a representative payee;

(c) Has previously served as a representative payee and has been found by a court of competent jurisdiction to have misused benefits;

(d) Has been convicted of a violation of:

(1) 5 U.S.C. 8345a or 8466a;

(2) Section 208 or 1632 of the Social Security Act (42 U.S.C. 408, 1383a); or

(3) 38 U.S.C 6101; or

(e) Has been convicted of an offense resulting in imprisonment for more than one year.

The agency may make exception to the prohibition in this paragraph (e) if the nature of the conviction is such that selection of the applicant poses no risk to the annuitant and the exception is in the best interest of the annuitant.

§ 849.304 Selecting a representative payee.

Before selecting an individual or organization to serve as a representative payee, the agency will conduct an investigation. The investigation will:

- (a) Require the applicant to submit documented proof of identity.
- (b) Verify the applicant's social security number.
- (c) Conduct a background check on the applicant to determine if the applicant has been convicted of any crimes as defined in § 849.303(d) or (e).
- (d) Determine if the applicant has previously served as a representative payee and if any previous appointments as representative payee were revoked or terminated due to misuse.

§ 849.305 Notice of the determination to select a representative payee.

(a) If the agency determines that the annuitant requires a representative payee due to mental incompetence or other legal disability or is physically or mentally unable to manage or direct the management of his or her annuity payments, the agency will issue a written decision to the annuitant. The decision will include a statement of the findings and determinations; specifically, the individual or organization named as the representative payee, and an explanation of the right to appeal the decision under §§ 831.110 and 841.307 of this chapter. If the annuitant appeals the decision, the agency will continue to make direct payments to the annuitant until the due process rights have been exhausted.

(b) A decision by the agency to *not* select an individual or organization as a representative payee is not subject to the due process procedures described in 5 U.S.C. 8347(d) and 8461(e).

Subpart D—Responsibility and Accountability of a Representative Payee

§ 849.401 Responsibilities of a representative payee.

(a) A representative payee shall, subject to review by the agency and subject to such requirements as it may periodically prescribe, apply the payments made on behalf of the annuitant only for the use and benefit of such annuitant, and in a manner or purpose that is in the best interest of the annuitant.

(b) A representative payee shall notify the agency of any event that will affect the amount of benefits the annuitant receives or the right of the annuitant to receive benefits.

(c) A representative payee shall notify the agency of any change in circumstances that would affect performance of the payee's responsibilities.

(d) A representative payee shall keep the annuity paid to him or her on behalf of the annuitant separate from his or her own money in an account that shows that the annuitant is still the owner of the funds. The applicant must show proof of this account when applying to be the representative payee and use this account for direct deposit. Exceptions to this paragraph (d) are joint accounts for spouses, when one spouse applies to be representative payee for the other spouse and they already have an existing joint account.

(e) Any interest earned on the annuity will be the annuitant's property.

(f) A representative payee shall respond to requests, regarding the use of annuity payments, from OPM within a specified period of time.

§ 849.402 Use of payments.

(a) *Current maintenance.* Payments certified to a representative payee on behalf of an annuitant shall be considered as having been applied for the use and benefit of the annuitant when they are used for the annuitant's current maintenance. Current maintenance includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.

(b) *Institutional care.* If an annuitant is receiving care in a Federal, state, or private institution because of mental or physical incapacity, current maintenance includes the customary charges made by the institution in providing care and maintenance, as well as expenditures for those items which will aid in the annuitant's recovery or release from the institution or expenses for personal needs which will improve the annuitant's conditions while in the institution.

(c) *Support of legal dependents.* If the current maintenance needs of the annuitant are met, the representative payee may use part of the payments for the support of the annuitant's legally dependent spouse, child, and/or parent.

(d) *Claims of creditors.* A representative payee may satisfy debts to creditors out of present benefit payments only if the current and reasonably foreseeable needs of the annuitant are met.

(e) *Conservation and investment.* After the representative payee has used the annuity payments consistent with the rules in paragraphs (a) through (d) of this section, any remaining annuity shall be conserved or invested on behalf of the annuitant. Any investment must show clearly that the representative payee holds the property in trust for the annuitant.

§ 849.403 Accountability of a representative payee.

(a) An individual, or institution, to whom payments are made as representative payee on behalf of an annuitant is accountable for the use of the payments and shall submit a written report in such form and at such times as the agency may require, accounting for the payments certified to him or her on behalf of the annuitant.

(b) If, however, such payee is a court-appointed fiduciary and, as such, is required to make an annual accounting to the court, a true copy of each such account filed with the court may be submitted in lieu of the accounting form prescribed by the agency.

(c) If any representative payee fails to submit the required accounting within the specified period of time after it is requested, no further payments shall be made to the representative payee on behalf of the annuitant unless for good cause shown, the default of the representative payee is excused by the agency and the required accounting is thereafter submitted.

(d) At any time after the agency has selected a representative payee, the agency may ask such payee to submit information showing a continuing relationship to the annuitant and a continuing responsibility for the care of the annuitant. If the representative payee does not

give the agency the requested information within the specified period of time, the agency may stop paying such payee unless the agency determines that the payee had a good reason for not complying with the request, and the agency receives the information requested.

Subpart E—Misuse of Annuity by a Representative Payee

§ 849.501 Misuse of benefits by a representative payee.

(a) It is unlawful for a representative payee to misuse the payments received on behalf of an annuitant. For purposes of this subpart, misuse of benefits by a representative payee occurs in any case in which the representative payee receives payment on behalf of an annuitant and embezzles or converts such payment, or any part thereof, to a use other than for the use and benefit of the annuitant.

(b) The penalty for a representative payee found to be in violation of paragraph (a) of this section is a fine, imprisonment for not more than 5 years, or both.

(c) If the agency determines that a representative payee has misused any payments as described in paragraph (a) of this section, the agency will promptly revoke the certification for payment of benefits to the representative payee, and will make payment to an alternative representative payee or, if the interest of the annuitant would be served thereby, to the annuitant.

(d) The agency will make the annuitant whole by repaying any annuity that was misused by the representative payee once the misused benefits have been repaid to the agency by the representative payee.

§ 849.502 Liability for misused funds.

(a) A representative payee who misuses benefits, as determined in § 849.501(a), is responsible for repayment of the misused benefits.

(b) OPM will seek restitution from the former representative payee.

Subpart F—Changes of the Representative Payee

§ 849.601 When a new representative payee will be selected.

(a) When the agency learns that the interests of the annuitant are not served by continuing payment to the present representative payee or that the present representative payee is no longer able or willing to carry out the payee responsibilities, the agency will undertake to find a new representative payee.

(b) The agency will select a new representative payee if the agency finds a preferred payee or if the present payee:

(1) Has been found by the agency or a court of competent jurisdiction to have misused the benefits;

(2) Has not used the benefit payments on the annuitant's behalf in accordance with the rules in this part;

(3) Has not carried out the other responsibilities described in this subpart;

(4) Dies;

(5) No longer wishes to be the representative payee;

(6) Is unable to manage the benefit payments; or

(7) Fails to cooperate, within a reasonable time, in providing evidence, accounting, or other information requested by the agency.

(c) The agency may suspend payment as explained in § 849.202(c) if we determine that making direct payment to the annuitant would cause substantial harm. Payments, including all retroactive amounts due, will resume once a representative payee is located.

§ 849.602 When representative payments will be stopped.

If an annuitant demonstrates that he or she is mentally and physically able to manage or direct the management of benefit payments, the agency will make direct payment to the annuitant. Information which the annuitant may give to the agency to support his or her request for direct payment includes, but is not limited to, the following:

(a) A physician's or other licensed health practitioner's statement regarding the annuitant's condition, or a statement by a medical officer of the institution where the

annuitant is or was confined, showing that the annuitant is able to manage or direct the management of his or her funds;

(b) A certified copy of a court order restoring the annuitant's rights in a case where an annuitant was adjudged legally incompetent; or

(c) Other evidence which establishes the annuitant's ability to manage or direct the management of benefits.

§ 849.603 Transfer of conserved or accumulated funds.

A representative payee who has conserved or invested annuity payments shall transfer these funds and any interest earned from the invested funds to either a successor payee, to the annuitant, or to the agency as we will specify. If the funds and the earned interest are returned to the agency, we will recertify them to the successor representative payee or to the annuitant.